Cause No. 13-0073-CV

THE SUPREME COURT OF TEXAS

IN RE JOHN DOE a/k/a "TROOPER", Relator

From the 152nd Judicial District Court of
Harris County, Texas;
Cause No.: 2010-13724

and

From the First District Court of Appeals
Houston, Texas;
Cause No.: 01-11-00683-CV

RELATOR JOHN DOE a/k/a "TROOPER'S" BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Respectfully submitted,

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ORAL ARGUMENT REQUESTED

Cause No. 13-0073-CV

IN RE JOHN DOE A/K/A TROOPER,

John Doe a/k/a Trooper, Relator

IDENTITY OF THE PARTIES AND COUNSEL

Relator certifies that the following is a complete list of parties, attorneys, and any other person or entity that has an interest in the outcome of this lawsuit:

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TO THE HONORABLE TEXAS SUPREME COURT:

COMES NOW Relator, John Doe a/k/a "Trooper"[1] ("Relator" or "Doe") and files this Brief in Support of his Petition for Writ of Mandamus. Relator would show that all references in the trial court to "John Doe," "Doe," and "Trooper" means Relator, all references to "Petitioner(s)" means Real Parties in Interest, Robert T. Brockman and/or The Reynolds and Reynolds Company ("Brockman," and "Reynolds," respectively, and collectively, "R & R"), and all references to Google, Inc. means Real Party in Interest, Google, Inc. ("Google"). Relator would respectfully show the Court as follows:[2]

STATEMENT OF THE CASE

R & R filed a Rule 202 Petition against Google seeking the name, address and telephone number of the internet blogger(s) known as "Trooper" or "the Trooper" in the 152nd Judicial District Court of Harris County, Texas, the Honorable Robert Schaffer, presiding ("Respondent"). (C.R. 7-15). R & R alleged Doe's internet blog known as "Reynolds News and Information," had defamed and disparaged R & R. (C.R. 10). R & R sought the disclosure of Doe's identity in anticipation of filing a suit against Doe for libel and business disparagement and to

[1] Doe will be referred to in the masculine and the singular, regardless of Doe's actual gender or numbers.

[2] Doe incorporates herein for all purposes his Petition for Writ of Mandamus and the Appendix attached thereto. References to the Appendix herein are to the Appendix filed with Doe's Petition.

investigate whether R & R could bring a claim for breach of fiduciary duty against Doe pursuant to TEX. R. CIV. P. 202.1 (a) & (b). (C.R. 10).

Doe filed a Special Appearance objecting to the Court's personal jurisdiction over him, and subject thereto, a Motion to Quash and Motion for Protective Order ("Does' Motions"). (C.R. 47-62, 27-42, 87-103, 460-66, 615-38, 645-50). Doe argued the disclosure of his identity would violate his fundamental First Amendment right to anonymous free speech and the statements made on the blog did not rise to the level of actionable conduct warranting the disclosure of Doe's identity. (C.R. 39, 63-66). Respondent held an evidentiary hearing on R & R's Petition and Doe's Motions. (R.R. 1-286). After the hearing, Respondent granted R & R's Rule 202 Petition and denied Doe's Motions. (App. 6 & 7). On May 21, 2010, Respondent ordered Google to disclose Doe's identity to R & R one month later. (App. 7).

Doe timely filed his mandamus[3] in the First District Court of Appeals pursuant to Respondent's Second Amended Order, on August 15, 2011. (App. 1 & 4). On May 18, 2012, Justices Keyes, for the Panel, and Justice Bland denied

[3] Doe filed two petitions for writ of mandamus with the First District Court of Appeals. See Doe's Petition, p. 2-3 (App. 6, 7, 9). The Court of Appeals denied the first mandamus without prejudice to Doe's refiling of another mandamus pursuant to an Amended Order entered by Respondent. (App. 5, 9). Prior to Respondent's entry of the Amended Order, Doe reurged his Special Appearance, and subject thereto, his Motions. (C.R. 615-60) (R.R. 12-15, 851- 856). Respondent's Second Amended Order contains the same language as Respondent's Amended Order with the exception that Respondent's Second Amended Order required Doe file his second mandamus by August 15, 2011. (App. 4).

Doe's Petition, with Justice Sharp dissenting. (App. 1). Doe filed a Motion for Rehearing. Justices Keyes and Bland denied the Motion for Rehearing, again with Justice Sharp dissenting. (App. 2). Doe filed a Motion for En Banc Reconsideration. Justice Keyes, for the Court, denied the Motion, with Justice Sharp dissenting on November 29, 2012. (App. 3). The Court's Memorandum Opinion denying Doe's second Petition for Writ of Mandamus, the subject of this petition, is cited at No. 1-11-00683-CV; *In Re John Doe a/k/a Doe, Relator*. (App. 1).

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court pursuant to Article V, § 6 of the Texas Constitution and §22.221 (a)-(b) of the Texas Government Code. An order pursuant to Rule 202 allowing pre-suit discovery incident to a contemplated lawsuit against a nonparty is not a final appealable order. Therefore, Doe's remedy is by mandamus. *See, e.g., IFS Security Group, Inc. v. Am. Equity Ins. Co.*, 175 S.W.3d 560, 563 (Tex. App. – Dallas 2005, no pet.).

ISSUES PRESENTED

Issue One

Respondent clearly abused its discretion for which there is no adequate remedy by appeal when Respondent found that it had jurisdiction and was a proper venue to grant R & R's Rule 202 Petition.

Issue Two

Respondent clearly abused its discretion for which there is no adequate remedy by appeal when Respondent granted R & R's Rule 202 Petition ordering Google to disclose Doe's identity in violation of Doe's fundamental First Amendment right to anonymous free without requiring R & R to introduce *prima facie* proof raising a genuine issue of material fact for each of the elements of R & R's claims within its control.

STATEMENT OF FACTS

The Reynolds and Reynolds Company ("Reynolds") is an Ohio corporation with its principal place of business in Kettering, Ohio. (C.R. 7). Reynolds is a privately held company that develops and sells dealer management computer systems ("DMS") to automobile retailers. (C.R. 8). Reynolds is one of the two largest DMS providers in the country. (R.R. 580).

Robert T. Brockman is the founder and CEO of Universal Computer Systems, Inc. ("UCS"). (C.R. 141-42). In 2006, UCS acquired Reynolds, then a public-traded company, for $2.8 billion. (C.R. 141-42). After the purchase, the combined companies provided DMS systems to 11,000 North American automobile dealerships. (C.R. 141-146). Mr. Brockman became the Chairman and CEO of Reynolds after the acquisition. (C.R. 8). He is known as a "tough,

opinionated, hard-nosed businessman" "who sets rigid terms in contracts and enforces them to the letter." (C.R. 141).

UCS's takeover of Reynolds was highly controversial (C.R. 110-36) (R.R. 544-66). In 2007, the *Dayton Business Journal* reported Reynolds was "making broad changes to how it operates" and that the "blending of the two firms has created a culture clash." (C.R. 138-39). Since UCS's purchase and Mr. Brockman's takeover, Reynolds has lost customers, laid off employees, and experienced a decrease in employee satisfaction. (R.R. 544-66).

At the time of the acquisition, Mr. Brockman was described as an "intensely private" "shy tech nerd," who declined interviews. (C.R. 141-42). However, in February 2007, Mr. Brockman addressed the media at the National Automobile Dealers Association Convention. (C.R. 133) (R.R. 559). In November 2007, Mr. Brockman launched a "road show" to visit automobile dealers in twenty cities. (C.R. 110-12) (R.R. 544-46). *Automotive News* reported that Mr. Brockman was giving up his media shy habits and warming to his role as the public voice and face of Reynolds. (C.R. 110) (R.R. 544). *Autonews.com* soon designated Mr. Brockman one of its top ten news makers, stating, "Dealers either love him or hate him," but Mr. Brockman "has emerged from the shadows to be the public face of the nation's largest vendor of dealership management systems." (C.R. 147). Mr. Brockman remains the public face of Reynolds. (C.R. 101, 110-31, 138-39, 141-

44) (R.R. 544-65).[4] Meanwhile, at the end of 2008, *Glassdoor.com*'s employee satisfaction ratings ranked R & R as having the third worst overall rating, with a score of 2.0%. (C.R. 123-29) (R.R. 560-65). Mr. Brockman only had an 8% approval rating as CEO. (C.R. 123-29) (R.R. 560-65).

PROCEDURAL HISTORY

A. R & R seeks the disclosure of Doe's identity

R & R's Rule 202 Petition claimed an individual using the pseudonym "The Trooper," formed and authored an internet web log ("blog") entitled "Reynolds News & Information" in 2007. (C.R. 8-9). R & R asked Respondent to issue an order authorizing R & R to take a pre-suit deposition of Google to obtain the following:

> **The identity (name, address, and telephone number) of the individual or individuals to whom the following addresses or screen names are registered:**
>
> (i) the blog located at http://reynoldsinformation.blogspot.com/;
> (ii) the Trooper user i.d., "The Trooper;" and/or
> (iii) the email address reynoldsinfo@gmail.com

(C.R. 7-15).

R & R alleged the blog defamed and disparaged R & R. R & R sought the disclosure of Doe's identity in anticipation of filing a suit against Doe for libel and business disparagement and to investigate whether R & R could bring a claim for

[4] Website at C.R. no longer available.

breach of fiduciary duty against Doe pursuant to TEX. R. CIV. P. 202.1 (a) & (b). (C.R. 10).

R & R stated "[t]o be clear, Petitioners anticipate the institution of a suit in which one or both of Petitioners would be a party and/or; at a minimum, seek to investigate their potential claims." (C.R. 10). R & R requested waiver of Rule 202's requirement that Doe be served by publication, and Doe was "served" by email. (C.R. 13-14).

B. Doe's Special Appearance and Supplemental Special Appearance

Doe filed a Special Appearance and a Supplemental Special Appearance, and subject thereto, a Motion to Quash R & R's Rule 202 Petition and for a Protective Order ("Does Motions"). (C.R. 47-62, 27-42, 87-103, 460-66, 615-38, 645-50). Doe argued he has no contacts with Texas and a Texas court's exercise of jurisdiction over him would offend traditional notions of fair play and substantial justice. (C.R. 47-62, 460-66). Doe's Special Appearance was supported by affidavits from his attorney and from Doe himself. (C.R. 58-59, 464-465). Doe stated he is the blogger known as the "Trooper," he is not an employee or an officer or director of Reynolds, he is not and has never been a resident of Texas, he does not conduct business in Texas, he does not maintain a place of business in Texas, and he does not advertise or solicit customers in Texas. (C.R. 464-65). Respondent never ruled on Doe's Special Appearance, (C.R. 467-69), even though

it was set for written submission (C.R. 460), and even though Doe reurged it on multiple occasions. (C.R. 460-62, 472-76, 477-81, 487-92, 615-60) (R.R. 12-15, 851- 856).

C. Doe's Motion to Quash R & R's Rule 202 Petition and Motion for Protective Order

Doe's Motions asked Respondent to quash R & R's Petition because R & R failed to follow the pleading requirements of Rule 202.2, failed to follow the notice and service requirements of Rule 202.3, and failed to meet the burden of proof required by Rule 202.4 (C.R. 27-40, 87-154).

Doe argued disclosing his identity would destroy his First Amendment right to anonymous free speech. (C.R. 39, 63-66). Doe urged Respondent **not** to order the disclosure of Doe's identity without requiring R & R to raise a genuine issue of material fact on each element of R & R's claims. (C.R. 40, 63-66, 87-154). Doe contended the *In re Does: 1-10* summary judgment standard is the appropriate test to balance a defamation plaintiff's right to protect his reputation with a defendant's right to exercise free speech anonymously. (C.R. 40, 63-66, 87-154). Doe argued Doe's alleged blog statements were insufficient to raise a genuine issue of material fact on each element of R & R's defamation claims. (C.R. 40, 63-66, 87-154). Doe supported his motion with newspaper articles, internet articles, and Reynolds marketing materials and press releases. (C.R. 110-49).

D. R & R's Response & Doe's Objections

R & R filed a Response to Doe's Motions arguing that a good faith pleading standard sufficiently protected Doe's First Amendment Rights. (C.R. 158-83). R & R supported its response with an affidavit from Mr. Brockman, including exhibits containing excerpts of the Doe blog. (C.R. 184-251). Doe timely objected to Mr. Brockman's affidavit and the exhibits attached thereto. (C.R. 443-50). Doe objected that Mr. Brockman's affidavit and exhibits were inadmissible because Mr. Brockman failed to aver that the facts stated in his affidavit were within his *personal knowledge and true*; the affidavit contained improper factual and legal conclusions; the affidavit failed to properly authenticate the blog; the exhibits contained hearsay; and the exhibits violated the rule of optional completeness. (C.R. 443-50, 522-530).

E. The Evidentiary Hearing

On May 21, 2010, Respondent held an evidentiary hearing and heard oral argument from R & R, Doe, and Google. (R.R. 1-286, 544-845). Respondent admitted all of R & R's tendered exhibits and all of Doe's tendered exhibits. (R.R. 34:20-25-35:1-8). Doe introduced exhibits that establish:

1. Mr. Brockman is a limited purpose public figure with respect to (1) the controversy over UCS's purchase of Reynolds and (2) Reynolds's current handling of its business affairs (R.R. 544-59);

2. Reynolds has the third lowest employee satisfaction rating of the fifty lowest ranked employers (R.R. 560);

3. Mr. Brockman only has an 8% CEO approval rating by Reynolds's employees (R.R. 560);

4. Reynolds and Dealer Computer Services, Inc. ("DCS") have been involved in public litigation with Ford and its automobile dealer customers over their business practices, (R.R. 544-46, 566-70, 604-70; 677-841);[5]

5. Reynolds's automobile dealer customers are not satisfied with its handling of their accounts since UCS's purchase of Reynolds, (R.R. 671-73); and

6. UCS's takeover of Reynolds was hostile and morale of Reynolds's employees has suffered as a result of Mr. Brockman's management practices. (R.R. 674-76).

During the hearing, R & R tendered Mr. Brockman's amended affidavit and the exhibits attached thereto, including the same blog excerpts and an unsigned employment agreement, over Doe's objections (R.R. 45-286, 288-542) (C.R. 522-26). The only difference between Mr. Brockman's first affidavit and his amended affidavit is the inclusion of the words that the sworn statements therein are based on his personal knowledge and are true and correct. (C.R. 184-87) (R.R. 288-90).

F. Respondent's May 21, 2010, Orders Ordering Google to Disclose Doe's Identity by June 21, 2010

Respondent granted R & R's Petition and denied Doe's Motions and ordered Google to disclose Doe's identity one month later. (C.R. 470-71) (R.R. 35-42).

[5] UCS merged with DCS, now UCS is known as DCS. (C.R. 162).

G. Doe's First Petition for Writ of Mandamus in the First District Court of Appeals

Doe timely filed a Petition for Writ of Mandamus with the First District Court of Appeals. (App. 6, 7, 9). In early 2011, the Court heard oral argument. In May 2011, the Court of Appeals notified the Parties it was modifying its prior orders staying the trial court proceedings to allow the trial court to "take appropriate action in light of *In re John Doe 1 & 2*, 337 S.W.3D 862 (Tex. 2011)." (App. 8).

Shortly thereafter, Petitioners moved the trial court to modify its May 21, 2010, Order to order a deposition on written questions instead of a subpoena duces tecum on Google. (App. 5). Respondent filed a Response, objections and a Motion for Protective Order re-urging his Special Appearance, Motion to Dismiss and Motion for Protective Order. (C.R. 615-60).

H. Respondent's May 20, 2011 Hearing and Amended Order

Respondent held an oral hearing on Petitioners' Motion and Doe's Motions. (App. 4, 5) (R.R. 846-83). Respondent entered its Amended Order granting R & R's Rule 202 Petition and denying Doe's Motions. (App. 5). Respondent ordered the disclosure of Doe's identity through a deposition on written questions of Google. (App. 5). In June 2011, the First District Court of Appeals entered an order dismissing Respondent's Petition without prejudice to its refiling. (App. 5).

On July 15, 2011, Respondent entered its Second Amended Order which is identical to its May 2011, Order except it ordered Doe to file a new mandamus by August 15, 2011. (App. 4). Doe timely filed his second mandamus, the subject of this case, in the First District Court of Appeals.

SUMMARY OF THE ARGUMENT

ISSUE 1: This Court has admonished trial courts to strictly limit the use of Rule 202 to prevent abuse of the Rule and to ensure it is not used as an end-run around discovery limitations. Rule 202 only permits a trial court to order discovery that would be available if the anticipated suit or potential claim were filed. As a prerequisite to ordering Rule 202 discovery, a trial court must find it is a proper court. A court is proper only if it would have personal jurisdiction over the parties in the anticipated or potential claim and if it has venue. Respondent does not have personal jurisdiction over Doe and is not a proper venue under Rule 202. Respondent clearly abused its discretion for which there is no adequate remedy by appeal when Respondent failed to strictly follow the requirements of Rule 202.

ISSUE 2: Rule 202.4 required findings do not exist in a vacuum. First, the disclosure of an anonymous speaker's identity is subject to First Amendment protections. Second, under *In re Does 1 and 2* and *In re Wolfe*, Texas courts must engage in an active oversight role to ensure a Rule 202 Petition is not abused.

Therefore, when considering whether R & R met its Rule 202.4 burdens of proof, Respondent should have: 1) considered the limitations imposed by the First Amendment right to anonymous free speech; 2) applied the *Does: 1-10* summary judgment standard requiring R & R to present *prima facie* proof of each of the elements of R & R's claims within its control; 3) determined that R & R's summary judgment evidence raised a genuine issue of material fact on each of the elements of R & R's claims; and 4) then determined whether R & R had met its Rule 202.4 burdens. R & R failed to present *prima facie* proof of each of the elements of its claims sufficient to withstand summary judgment under *Does: 1-10* because 1) R & R failed to introduce competent summary judgment evidence on damages, and 2) no ordinary person of reasonable intelligence when reading the blog posts in context would perceive them as containing objectively verifiable statements of fact. Because R & R failed to raise a genuine issue of material fact on each of the elements of its claims within its control, Respondent clearly abused its discretion for which Doe has no adequate remedy by way of appeal.

ARGUMENT AND AUTHORITIES

A. Introduction

This is a case of first impression. Doe asks this Court to: 1) require Respondent to strictly adhere to the threshold requirements of Rule 202 prior to ordering pre-suit discovery, as this Court required in *In re Does 1-2* and *In re*

Wolfe, and 2) if the Rule 202 threshold requirements are met, to impose a bright line test for Texas courts to follow that allows legitimately aggrieved parties to redress actionable conduct while protecting anonymous internet speakers' fundamental First Amendment rights. R&R, on the other hand, is asking this Court to ignore Rule 202, to ignore *Does 1 and 2* and *Wolfe*, and to eviscerate Trooper's First Amendment rights without personal jurisdiction over him in violation of basic tenants of due process. If this Court allows Respondent's decision to stand, it will enable; and indeed, encourage Texas courts to destroy any anonymous internet speaker's First Amendment rights through pre-suit depositions based on mere allegations of harm, regardless of their merit and regardless of the internet speaker's location or contacts with Texas. [6]

If this Court finds Respondent had jurisdiction and was a proper venue for R & R's Rule 202 Petition, Doe urges this Court to apply the summary judgment standard articulated in *In re Does: 1-10* to Respondent's, July 15, 2011 Order in addition to the burdens under Rule 202.4 to determine whether Respondent clearly

[6] When compared to other states, "[b]y express rule, [Rule 202.1 (a)-(b)], Texas authorizes the broadest form of presuit discovery for private parties." Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 22, 241-42 (2007). A very real consequence of Respondent's July 15, 2011, Order would be a flood of Rule 202 pre-suit requests for discovery in Texas seeking the identity of anonymous internet bloggers wherever they may be located. Simply by engaging in anonymous speech on the internet an internet user "would subject themselves to [personal] jurisdiction in every state." *Celestial Inc. v. Swarm Sharing Hash 8ab508ab0f9ef8b4cdb14c6248f3 C96c65beb882 on November 28, 2011*, Case No. CV-12-00145 DDP, 2012 U.S. Dist. LEXIS 41000, at *6 n. 2 (C.D. Ca. Mar. 23, 2012).

abused its discretion. The *Does: 1-10* summary judgment standard, requiring R & R to introduce *prima facie* proof raising a genuine issue of material fact on each of the elements of R & R's claims within R & R's control, coupled with the Rule 202.4 findings is clear, easily applied, familiar to judges and counsel, and it strikes the right balance between the anonymous speaker's First Amendment rights and the aggrieved party's rights.

B. Mandamus

Mandamus is an extraordinary remedy, available only when a trial court clearly abuses its discretion and there is no adequate remedy on appeal. *In re Kuntz*, 124 S.W.3d 179, 180-81 (Tex. 2003). A trial court has no discretion in determining what the law is or applying the law to the facts. A trial court's failure to analyze or apply the law correctly, as when a discovery order conflicts with the Texas Rules of Civil Procedure, constitutes an abuse of discretion. *Id.* at 181. A party will not have an adequate remedy by appeal when the appellate court would be unable to cure the trial court's discovery error. *Id.*

C. The First Amendment right to anonymous free speech

The First Amendment protects anonymous speech. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999). "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but **an honorable tradition of advocacy and of dissent**." *Doe v. Cahill*, 884 A.2d 451,

456 (Del. 2005) (emphasis added). The Supreme Court has noted "[a]nonymity is a shield from the tyranny of the majority," and an author's decision to remain anonymous is protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356-57 (1995). The protections of the First Amendment extend to the Internet. *Reno v. ACLU,* 521 U.S. 844, 870 (1997). The internet serves a "vital role in the exchange of ideas and robust debate on matters of public concern." *In re John Does 1-10*, 242 S.W.3d 805, 812 (Tex. App.—Texarkana 2007, no pet.). Internet speech in forums such as blogs and chat rooms is becoming "the modern equivalent of political pamphleteering." *Cahill,* 884 A.2d at 456. Courts caution that internet anonymity must be protected:

> Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas [;] . . . the constitutional rights of Internet users, including the First Amendment right to speak anonymously, **must be carefully safeguarded.**

Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092, 1097 (W.D. Wash. 2001). (citations omitted). (emphasis added).

A court order, even when issued at the behest of a private party, is state action subject to constitutional limitations. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). Court orders that compel the production of an individual's identity in a situation that threatens fundamental rights are "subject to the **closest**

scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (emphasis added); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

I. Issue 1: Respondent clearly abused its discretion for which there is no adequate remedy by appeal when Respondent found that it had jurisdiction and was a proper venue to grant R & R's Rule 202 Petition.

An appellate court reviews a trial court's ruling on a Rule 202 Petition under an abuse of discretion standard. *In re Hewlett Packard*, 212 S.W.3d 356, 360 (Tex. App.–Austin 2006, orig. proceeding).

A. Rule 202 required Respondent to find it was a proper court with jurisdiction over the parties

This Court recently admonished Texas courts to strictly construe and apply Rule 202. In *In re Michael Wolfe*, this Court granted mandamus relief when a county attorney had not joined in a Rule 202 suit, and the county attorney was required by statute to prosecute the anticipated suit. 341 S.W.3d 932, 933 (Tex. 2011). This Court stated:

> **[P]re-suit discovery "is not an end within itself";** rather, it "is in aid of a suit which is anticipated" and "ancillary to the anticipated suit." *Office Emps. Int'l Union Local 277 v. Sw. Drug Corp*., 391 S.W.2d 404, 406 (Tex. 1965). **To prevent an end-run around discovery limitations that would govern the anticipated suit, Rule 202 restricts discovery in depositions to "the same as if the anticipated suit or potential claim had been filed."** TEX. R. CIV. P. 202.5 . . . **The Department cannot obtain by Rule 202 what it would be denied in the anticipated action . . . Rule 202 is not a license for**

> **forced interrogations. Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule.**

Wolfe, 341 S.W.3d at 933. (emphasis added).

Similarly, in granting two anonymous bloggers mandamus relief from a Rule 202 petition seeking the disclosure of their identities, this Court stated:

> The trial court clearly abused its discretion **in failing to follow Rule 202.**
>
> …
>
> **The intrusion into otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly.** One noted commentator, Professor Lonny Hoffman, has observed that there is **"cause for concern about insufficient judicial attention to petitions to take presuit discovery"** and that **"judges should maintain an active oversight role to ensure that [such discovery is] not misused."** Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, *supra at* 273-74. **We agree.**
>
> Rule 202.5 provides that use of a deposition **may be restricted or prohibited "to prevent abuse of this rule"**, **but that remedy for noncompliance affords relators no relief from their complaint that their identities not be disclosed**. Thus, relators are entitled to mandamus relief. *In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008) (party to Rule 202 proceeding has no adequate remedy on appeal if court abused its discretion in ordering discovery that would **comprise procedural or substantive rights**).

In re John Does 1 and 2, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (emphasis added).

Rule 202 allows a trial court to order a pre-suit deposition "(1) to perpetuate or obtain a person's own testimony or that of any other person for use in an

anticipated suit; or (2) to investigate a potential claim or suit." TEX. R. CIV. P. 202.1 states, "[t]he court must order a deposition to be taken **if, but only if, it finds that:**

> (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or
>
> (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure."

TEX. R. CIV. P. 202.4.

Additionally, "[t]he scope of discovery in depositions authorized by this rule is **the same as if the anticipated suit or potential claim had been filed**." TEX. R. CIV. P. 202.5 (emphasis added). A petition "**must be filed in a proper court of any county** (1) where venue of the anticipated suit may lie, if suit is anticipated; or (2) where the witness resides, if no suit is yet anticipated." TEX. R. CIV. P. 202.2(b) (emphasis added). The term "must" indicates a **condition precedent**. TEX. GOV'T CODE ANN. § 311.016; *see also* § 311.002(4). "Proper court" is interpreted as "a court with jurisdiction over the underlying dispute." *City of Willow Park v. Squaw Creek Downs*, 166 S.W.3d 336, 340 (Tex. App.—Fort Worth 2005, no pet.); *see In re Donna Indep. Sch. Dist.*, 299 S.W.3d 456, 459 (Tex. App.—Corpus Christi 2009, orig. proceeding).

Therefore, before a court can order a Rule 202 deposition, it **must** find, as a **condition precedent,** that the petition was filed in a proper court with jurisdiction over the anticipated suit or potential claim. To determine whether a court is "proper," courts "look to the substantive law respecting the anticipated dispute." *City of Dallas v. Dallas Black Fire Fighters Assoc.*, 353 S.W.3d 547, 553-55 (Tex. App.—Dallas, no pet.) (citing *In re Wolfe*, 341 S.W.3d at 933). For example, in *City of Dallas*, the Court of Appeals stated:

> The Texas Constitution states, "The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts." TEX. CONST. ART. V, § 31(b). Pursuant to that authority, the supreme court has promulgated the Texas Rules of Civil Procedure. *See generally* TEX. R. CIV. P. 1-822. **Those rules specifically provide they are not to be construed to (1) "enlarge or diminish any substantive rights or obligations of any parties to any civil action" or (2) "extend or limit the jurisdiction of the courts of the State of Texas nor the venue of actions therein."** TEX. R. CIV. P. 815, 816.
>
> . . .
>
> The rules of civil procedure, including rule 202, provide a procedural mechanism **"to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law."** TEX. R. CIV. P. 1.
>
> **Therefore, in determining jurisdiction, we look to the substantive law respecting the anticipated suit.** *See Wolfe*, 341 S.W.3d at 933; *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336, 340-41(Tex. App.—Fort Worth 2005, no pet.) (trial court had jurisdiction over plaintiff's rule 202 petition to investigate billing dispute and validity of lien filed by city against plaintiff's property,

> where city conceded trial court would have jurisdiction over any trespass to try title suit arising from its lien).

City of Dallas, 353 S.W.3d at 553-55. (emphasis added).

This Court also looks to the substantive law governing the anticipated suit or potential claim to determine whether Rule 202 depositions are appropriate. In *Wolfe*, individual citizens sought pre-suit discovery to "investigate grounds for removal of a county official." *Wolfe*, 341 S.W.3d at 932. This Court looked to the law governing the potential claim to determine the trial court clearly abused its discretion when it granted the Rule 202 petition. *Id.* at 933. Similarly, this Court also looked to the law governing the anticipated suit in granting mandamus when the anticipated suit was based on a statute that limits discovery until after the plaintiff serves an expert report. *Jorden*, 249 S.W.3d at 420.

Here, Respondent abused its discretion by failing to strictly adhere to the requirements of Rule 202. Before even addressing whether R & R met its Rule 202 burdens, Respondent should have, consistent with the requirements of the Rule and this Court's admonishments that the Rule be carefully supervised to prevent its abuse, looked to the anticipated or potential claim to determine whether it was a "proper court" to order Rule 202 depositions. TEX. R. CIV. P. 202.2(b); *Wolfe*, 341 S.W.3d at 933; *Jorden*, 249 S.W.3d at 420; *City of Willow Park*, 166 S.W.3d 336,

340-40; *City of Dallas*, 353 S.W.3d 547 at 553-55. Respondent failed to engage in this threshold inquiry, which was a clear abuse of discretion.

Respondent could not, based on the pleadings and evidence admitted, have determined that it was a "proper court" under Rule 202. R & R's anticipated suit and potential claim were against Doe. (C.R. 7-9). Therefore, as a prerequisite to ordering Rule 202 depositions disclosing Doe's identity, Respondent had to find it could assert personal jurisdiction over Doe in the anticipated suit or potential claim. *See Wolfe*, 341 S.W.3d at 933; *City of Dallas*, 353 S.W.3d at 553-55. The pleadings and evidence establish Respondent could not assert jurisdiction over Doe. Doe and his counsel both submitted sworn affidavits establishing Doe is not and has never been a resident of Texas, does not conduct business in Texas, does not maintain a place of business in Texas, and does not advertise or solicit customers in Texas. (C.R. 57-59,464-66). R & R did not submit any evidence that Respondent could assert personal jurisdiction over Doe. Indeed, Reynolds, who R & R claims is Doe's employer, is an Ohio corporation with its principal office in Kettering, Ohio and the employment agreement R & R relies upon mandates **arbitration in Ohio.** (C.R. 432-38) (R.R. 524-29).[7]

[7] R & R claims Doe is an "Associate" (employee) of Reynolds who is bound by an employment agreement that contains a mandatory forum selection clause mandating arbitration in Dayton, Ohio, with limited exceptions. (C.R. 432-38). The arbitration agreement vests personal jurisdiction and venue over Doe in Dayton, Ohio. *See, e.g., Management Recruiters Int'l, Inc v. Bloor*, 129 F.3d 851, 854 (6th Cir. 1997) (forum selection clauses confer personal jurisdiction

Because Respondent did not have personal jurisdiction over Doe, Respondent clearly abused his discretion by disclosing Doe's identity and trampling his First Amendment rights in furtherance of R & R's anticipated suit or potential claim. (C.R. 451-53). Although Doe filed a Special Appearance, set it for a hearing by submission, and reurged it on multiple occasions, Respondent refused to rule on it. (C.R. 460-62, 472-76, 477-81, 487-92, 615-60) (R.R. 12-15, 851-856). Respondent has no jurisdiction to bind Doe to a judgment or hale him into court in Texas in R & R's anticipated suit or potential claim; therefore, Doe asks this Court to correct this abuse of discretion.

B. Equity required Respondent to find it was a proper court with jurisdiction over the Parties

Respondent's authority to assert personal jurisdiction over non-resident Doe is limited not only by Rule 202 itself, but also by the Due Process Clause of the Fourteenth Amendment. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). For any Texas court to have jurisdiction over Doe, the anticipated or potential claim must arise out of Doe's contact with Texas, or Doe must have had continuous and systematic contacts with Texas. *See id.* at 414-15. Doe would need to have certain minimum contacts with Texas such that the "maintenance of the suit does not offend 'traditional notions of fair play and

upon the courts in the chosen forum); *Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995) (venue is established by forum selection clause in arbitration agreement).

substantial justice.'" *Id.* at 414 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). These contacts with Texas would have to be such that Doe "should reasonably anticipate being haled into court" in Harris County, Texas. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Doe could "reasonably anticipate" being haled into court in Texas if he "purposefully avails himself of the privilege of conducting activities within" Texas, "thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Doe must not be haled into Texas court based on "random, fortuitous, or attenuated contacts." *Id.* at 475.

Rule 202 does not diminish the protections of *International Shoe v. Washington* and its progeny. The Texas Rules of Civil Procedure, including Rule 202, are "not to be construed to (1) 'enlarge or diminish any substantive rights or obligations of any parties to any civil action' or (2) **'extend or limit the jurisdiction of the courts of the State of Texas nor the venue of actions therein.'**" *City of Dallas*, 353 S.W.3d at 554 (quoting TEX. R. CIV. P. 815, 816) (emphasis added). Strict adherence to the rules of personal jurisdiction in Rule 202 is also consistent with the legislature's intent, which is "Rule 202 … is equitable in nature, and a court must not permit it to be used inequitably." TEX. R. CIV. P. 202, 1999 Comment 2. Rule 202 is to be **strictly construed, carefully supervised, and**

limited in scope. *See, e.g.*, *Does 1 and 2*, 337 S.W.3d at 862; *Wolfe*, 341 S.W.3d at 933.

Other courts have refused to assert personal jurisdiction over "John Doe" defendants in internet-related disputes. In *Celestial Inc. v. Swarm Sharing Hash 8ab508ab0f9ef8b4cdb14c6248f3 C96c65beb882 on November 28, 2011, Defendants*, the court ordered Celestial to show cause as to why the case should not be dismissed for lack of personal jurisdiction when Celestial filed actions against the Doe defendants for allegedly reproducing and distributing copies of a film copyrighted by Celestial. *Celestial*, Case No. CV-12-00145 DDP, 2012 U.S. Dist. LEXIS 41000, at *5 (C.D. Ca. March 23, 2012). Celestial sought permission to serve subpoenas on the relevant Internet service providers to obtain the names, addresses, and other identifying information of the Doe defendants. *Id.* at *2. The court, after reviewing the standards applied by other courts to discovery of the identities of anonymous internet users, including the motion to dismiss and summary judgment standard described *infra*, stated:

> The court need not decide among these variations here, as Celestial's discovery request fails even under *Columbia's* more-lenient "motion to dismiss" standard. In particular, the court finds that Celestial's Complaint would not survive a motion to dismiss for lack of personal jurisdiction.

Id. at *5.

Celestial alleged the Doe defendants "reside in, solicit, transact, or are doing business within the jurisdiction," because "[g]eo locating tools" have placed the IP addresses of the Doe defendants in California. *Id.* But Celestial also stated that it "does not make any representations as to the reliability or level of accuracy of IP address geolocation tools." *Id.* Celestial urged the court to order the Does' information disclosed, arguing it was "'simply premature to fully analyze the issue of personal jurisdiction,'" and ordering the Does' identities disclosed was "the only way to move forward on either front." *Id.*

The court disagreed and entered an order dismissing Celestial's case for lack of personal jurisdiction **with prejudice**, stating the court **could not set aside constitutional concerns in favor of Plaintiff's desire to subpoena the Doe Defendants' identifying information.** *Id.; see also Nu Image, Inc. v. Does 1-23,322*, 799 F. Supp. 2d 34, 42 (D.D.C. 2011) ("when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied.") (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978)).

As the court illustrated in *Celestial*, here, before Respondent considered whether R & R met its Rule 202 burdens, it should have determined that no Texas court is a proper court with jurisdiction and venue over Doe and dismissed R & R's Petition. The gravity of the First Amendment implications presented by Doe

further solidify that Respondent clearly abused its discretion in ordering Doe's identity disclosed.

This case provides even less support for Respondent's assertion of jurisdiction than *Celestial* because R & R makes no allegations whatsoever concerning Doe's connections with this state. In fact, the evidence affirmatively demonstrates a lack of personal jurisdiction over Doe. In *Celestial*, on the other hand, geolocation technology indicated the Doe defendants were in or near the court's territory, but the court still found that it did not have jurisdiction. *Celestial*, 2012 U.S. Dist. LEXIS 41000, at *5. Use of the internet from another state or county, without more, does not provide a Texas court with jurisdiction over an internet user. Therefore, Respondent clearly abused its discretion by granting R & R's Petition.

C. Rule 202 required Respondent to find it was a proper venue

Respondent also abused its discretion because venue is not proper in Harris County as required by Rule 202. R & R did not present any competent evidence establishing venue in Harris County. Harris County is not a venue where the anticipated suit may lie or where the witness resides.

1. Harris County is not a proper venue for R & R's anticipated suit for defamation

Section 15.017 states:

> A suit for damages for libel, slander, or invasion of privacy **shall** be brought **and can only be maintained in the county in which the plaintiff resided at the time of the accrual of the cause of action**, or in the county in which the defendant resided at the time of filing suit, or in the county of the residence of defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiff.

TEX. CIV. PRAC. & REM. CODE § 15.017 (emphasis added).

Respondent abused its discretion because Harris County is not a proper venue for Mr. Brockman's anticipated defamation claim. R & R failed to introduce any competent evidence that Harris County is where Mr. Brockman resided at the time of the accrual of his alleged defamation claim. (C.R. 7, 22-23). (R.R. 13, 34:21-35:1-8; 13:16-14:17; 855:11-856:11). The only evidence R & R introduced to establish that Mr. Brockman's residence was in Harris County at the time of the accrual of his defamation claims was R & R's Rule 202 Petition and the statements of counsel on the record during the evidentiary hearing. Pleadings, even those that are sworn or verified, are not competent evidence to prove the facts alleged in them.[8] (C.R. 7). *Laidlaw Waste Systems (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). Moreover, a court may not take judicial notice of the truth of the allegations in the pleadings. *In re: Contractor's Supplies, Inc*., No. 12-09-00231-CV, 2009 Tex. App. LEXIS 6396 (Tex. App.—Tyler Aug. 19,

[8] R & R's Rule 202 Petition states Mr. Brockman is a resident of Harris County but it does not state where Mr. Brockman resided at the time of the accrual of his alleged claim for defamation. (C.R. 7).

2009). Finally, argument of counsel is not evidence. *Love v. Moreland*, 280 S.W.3d 334, 336 n.3 (Tex. App.—Amarillo 2008, no pet).

Respondent also abused its discretion when it found that venue for Reynolds's anticipated defamation claim is proper in Harris County. Reynolds is an Ohio corporation. (C.R. 7). When a corporation is defamed, the defamation plaintiff is the owner of the business and not the business itself. *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960). R & R failed to introduce any evidence that Mr. Brockman is the owner of Reynolds.

2. Harris County is not a proper venue for R & R's anticipated suit for business disparagement.

To the extent that R & R anticipates filing suit against Doe for business disparagement,[9] Respondent abused its discretion by finding venue is proper in Harris County. The general venue rule states:

> (a) Except as otherwise provided by this subchapter or Subchapter B or C, all lawsuits shall be brought:
>
> (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
>
> (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
>
> (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person; or

[9] R & R did not plead this for the purposes of venue.

(4) if Subdivisions (1), (2), and (3) do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

TEX. CIV. PRAC. & REM. CODE § 15.002. There is no competent evidence in the record that all or a substantial part of the events and omissions giving rise to R & R's claims occurred in Harris County, Texas. The blog posts took place in "cyberspace,"[10] not in Texas. R & R also failed to introduce any evidence other than the statements of counsel during the evidentiary hearing that Reynolds resides in Texas. (R.R. 13:16-14:2). TEX. CIV. PRAC. & REM. CODE § 15.001 & § 15.001 (a)(4). Finally, R & R's Rule 202 Petition and counsel's statements that Mr. Brockman resided in Harris County during the hearings are not competent to establish venue in Harris County. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(4).

3. Harris County is not a proper venue for R & R's anticipated breach of fiduciary duty or breach of contract claims.

Respondent abused its discretion in finding proper venue for R & R's breach of fiduciary duty or breach of contract claims in Harris County. R & R claims Doe is an employee of Reynolds and attempts to rely on its unsigned employment agreement with Reynolds. (C.R. 432-38) (R.R. 524-29). Assuming for the sake of argument, the employment agreement was competent evidence and that Reynolds and Doe were parties to it, which Doe denies, R & R's employment agreement

[10] Doe does not address § 15.002 (2) and (3), because no county has venue over Doe, as explained above.

states all disputes, with limited exceptions, "**shall be settled by arbitration in Dayton, Ohio." (**R.R. 524-29). R & R's employment agreement establishes jurisdiction and venue over Doe in Dayton, Ohio, not in Harris County, Texas. Because Mr. Brockman, in his individual capacity, is not a party to the employment agreement, he has no claim for breach of fiduciary duty or contract against Doe.

4. Harris County is not a proper venue to investigate any potential claim or suit.

To the extent that R & R's petition sought to *investigate* potential claims under Rule 202.2(b),[11] Respondent abused its discretion by finding that venue was proper in Harris County, Texas. (C.R. 7, 11). Rule 202.2(b) states that suit must be filed where the witness resides. R & R's Petition sought information from Google. (C.R.10). Google's registered agent for service of process is in Austin, Texas (C.R. 7, 11), where its principal office in Texas is also located. If any Texas court were a proper venue, which Doe denies, it would be Travis County, the location of Google, not Harris County. (C.R. 7, 11). Therefore, Respondent abused its discretion in finding that Harris County is an appropriate venue for R & R's potential suit.

[11] R & R did not allege that venue was proper under Rule 202.2(b)(2).

D. Conclusion

Respondent failed to strictly comply with the requirements of Rule 202 when Respondent found it had jurisdiction and venue to grant R & R's Petition; therefore, Respondent clearly abused its discretion for which Doe has no adequate remedy by way of appeal.

II. Issue 2: Respondent clearly abused its discretion for which there is no adequate remedy by appeal when Respondent granted R & R's Rule 202 Petition ordering Google to disclose Doe's identity in violation of Doe's fundamental First Amendment right to anonymous free speech without requiring R & R to introduce *prima facie* proof raising a genuine issue of material fact for each of the elements of R & R's claims within its control.

A. Quantum of Proof Necessary for Disclosure

The First Amendment right to anonymous free speech is not absolute. *McIntyre*, 514 U.S. at 353; *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 55-56 (1985) (First Amendment does not protect copyright infringement); *Cahill*, 884 A.2d 451, 456 (De. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.").

Because the right is not absolute, the right must be weighed against the need for discovery to alleged wrongs. *Best Western Int'l, Inc. v. John Doe*, NO. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, at *9 (D. Ariz., July 25, 2006). To ensure the First Amendment rights of anonymous Internet speakers are not lost unnecessarily, courts typically require parties to make some showing before

obtaining discovery of the speakers' identities. *See, e.g., id*. Courts have recognized a range of possible showings. *Id*. The Delaware Supreme Court explained:

> an entire spectrum of 'standards'. . . . could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to survive a motion to dismiss, to a showing of *prima facie* evidence sufficient to withstand a motion for summary judgment and, beyond that, hurdles even more stringent.

Cahill, 884 A.2d 451, 457 (De. 2005).

Courts applying the more stringent hurdles also impose a balancing test, which balances the First Amendment right to anonymous free speech against the strength of the *prima facie* case presented and the necessity for disclosure of the anonymous speaker's identity to allow the petitioner to proceed. *Salehoo Group, Ltd. v. ABC Company*, 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010).

In *Dendrite*, Dendrite sought discovery of the identity of John Doe No. 3 based on alleged defamatory comments Doe posted on a Yahoo! Message Board about the company. *Dendrite Int'l, Inc. v. John Doe No. 3*, 775 A.2d 756, 759 (N.J. Ct. App. 2001). The *Dendrite* court affirmed the trial court's denial of Dendrite's motion because Dendrite failed to establish the harm resulting from Doe's allegedly defamatory statements. *Id.*

The five part framework established in *Dendrite* holds a plaintiff seeking such discovery must: (1) give notice; (2) identify the exact statements that

constitute allegedly actionable speech; (3) establish a *prima facie* cause of action against the anonymous speaker based on the complaint and all information provided to the court; and (4) "produce sufficient evidence supporting each element of its cause of action, on a *prima facie* basis, prior to a court ordering the disclosure of the identity of the unnamed defendant." *Id*. at 760. If the petitioner makes out a *prima facie* cause of action, the court must also (5) balance the anonymous speaker's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented *and* the necessity for the disclosure of the anonymous speaker's identity to allow the petitioner to properly proceed before ordering disclosure. *Id*. at 760-61.

The case law **coalesces** around the basic framework of the test articulated in *Dendrite*. *See, e.g., Salehoo,* 722 F. Supp. 2d at 1214.[12]

[12] Since internet speech began to explode, courts have struggled with the quantum of proof necessary to overcome an anonymous speaker's First Amendment rights. Over time, courts have held petitioners to higher and higher burdens of proof. Earlier cases required a good faith pleading standard or a motion to dismiss standard. *See* Craig Buske, *Note: Who is John Doe and Why Do we Care? Why a Uniform Approach to Dealing with John Doe Defamation Cases is Needed*, 11 MINN J.L. SCI. & TECH. 429 (Winter 2010). Newer cases have rejected these standards in favor of the *Dendrite* test or streamlined versions of it. *See, e.g., Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc*., 999 A.2d 184, at *7 (N.H. May 6, 2010); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456 (Md. 2009); *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005) ("plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard"); *USA Techs., Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. 2010), at *4 (requiring (1) "the plaintiff to adduce, without the aid of discovery, competent evidence addressing all of the inferences of fact essential to support a *prima facie* case on all elements of a claim" and (2) the court to balance the competing interests); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005) (same); *see also Pilchesky v. Gatelli*, 12 A.3d 430, at * 29 (Pa. 2011) (applying the *Dendrite* standard and requiring an affidavit from the

B. R & R failed to raise a genuine issue of material fact on each of the elements of R & R's claims within its control for defamation, business disparagement, breach of fiduciary duty, and breach of contract

1. *In re Does: 1-10* Summary Judgment Standard

Only one reported Texas case attempts to address the standard necessary to strip an anonymous speaker of his First Amendment rights against a complaining party's right to discover the anonymous speaker's identity. *In re Does: 1-10*, 242 S.W.3d 805, 819-23 (Tex. App–Texarkana 2007, orig. proceeding). In *Does: 1-10*, a hospital sued ten Does who allegedly defamed the hospital by posting "many scurrilous comments that unfairly disparage the Hospital, its employees, and the doctors," on a website. *Id.* at 810. The hospital asked the internet provider to disclose the identities of the Does pursuant to the Cable Communications Act. *Id.* at 810, 813. The trial court ordered the internet provider to disclose the names and addresses of the internet posters. *See id.* at 811.

Doe 1 filed a mandamus seeking to set aside the trial court's order. *Id*. at 811. The Texarkana Court of Appeals conditionally granted Doe 1's petition because the trial court failed to follow the Texas discovery rules. *Id.* at 819. The Court held if the trial court was presented with this matter again, **it should require the hospital to present a *prima facie* case on each element of the claims that**

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petitioner stating the information is sought in good faith and fundamentally necessary to secure relief).

were within its control before ordering the disclosure of the Doe's identities, citing the Delaware Supreme Court's decision in *Cahill*. *Id*. at 821-23. The court said:

> To obtain discovery of an anonymous defendant's identity under the summary judgment standard, a plaintiff must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question. In other words, **the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a claim within plaintiff's control**. *Id. Best Western*, 2006 U.S. Dist. LEXIS 56014, at *11; *Cahill*, 884 A.2d at 465.

Id. at 822-23.

In *In re John Does 1 and 2*, this Court admonished trial courts to engage in **active oversight** to ensure Rule 202 discovery is not misused and, if necessary, to restrict or prohibit Rule 202 discovery to prevent abuse of Rule 202. 337 S.W.3d at 865. If this Court does not require petitioners like R & R to present *prima facie* proof raising a genuine issue of material fact for each element of each claim within a petitioner's control before ordering the disclosure of an anonymous speaker's identity, the effect on internet free speech will be both significant and chilling. *See, e.g., FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-85 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978); *Doe v. Cahill*, 884 A.2d 451, 457 (De. 2005).

2. R & R's Summary Judgment Evidence is Incompetent

R & R failed to provide Respondent with any competent summary judgment evidence sufficient to meet R & R's burden to raise a genuine issue of material fact on each of the elements of R & R's claims within its control. The only evidence R & R offered in support of its Rule 202 Petition was:

1) Mr. Brockman's affidavit and the exhibits attached thereto (C.R. 443-50);

2) Mr. Brockman's amended affidavit and the exhibits attached thereto;[13] and

3) R & R's Rule 202 Petition. (C.R. 7-23).

Doe objected to both affidavits and their exhibits. (C.R. 443-50, 522-30) (R.R. 28). Mr. Brockman's first affidavit and exhibits were inadmissible because the affidavit failed to aver the facts were *within Mr. Brockman's personal knowledge and true*; it contained improper factual and legal conclusions; Mr. Brockman failed to properly authenticate the exhibits; the exhibits contained hearsay; and the exhibits violated the rule of optional completeness. (C.R. 443-50, 522-30) (R.R. 28). Doe objected to Mr. Brockman's amended affidavit because it was conclusory and untimely. (R.R. 45-286, 288-542) (C.R. 522-26).

[13] Both affidavits contain the same selected excerpts from the Doe blog and a copy of an unsigned employment agreement R & R alleges Doe signed. (R.R. 45-286, 288-542).

Even if Doe had not objected to Mr. Brockman's affidavits, they are incompetent summary judgment evidence because they contain substantive defects. (C.R. 443-50, 522-530) (R.R. 28). *See, e.g., Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ); *Harley-Davidson Motor Co. v. Young*, 720 S.W.2d 211, 213 (Tex. App.—Houston [14th Dist.] 1986, no writ).

R & R's Rule 202 Petition, even though it was admitted into evidence, is also incompetent summary judgment evidence. (R.R. 34:20-35:1). In *In re Contractor's Supplies, Inc.*, No. 12-09-00231-CV, 2009 Tex. App. LEXIS 6396, at *15-16 (Tex. App.—Tyler Aug. 17, 2009, orig. proceeding), the court granted mandamus relief because the petitioner did not meet its Rule 202 burden. The Court stated, "the petitioner must introduce evidence which supports the findings required by Rule 202." *Id.* at 14. Petitioner argued his verified petition and a letter from counsel supported his Rule 202 burden. *Id.* at 15, 18. The court disagreed. Even if the petition and letter had been admitted into evidence, neither was admissible. The court stated:

> Pleadings are not generally competent evidence to prove the facts alleged in them, even if, as here, they are sworn or verified. *Laidlaw Waste Systems (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). And a court may not take judicial notice of the truth of the allegations in the pleadings included in its records. *Gruber v.*

> *CACV of Colorado, LLC*, No. 05-07-00379-CV, 2008 Tex. App. LEXIS 2314, 2008 WL 867459, at *2 (Tex. App.—Dallas Apr. 2, 2008, no pet.) (mem. op.); *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App.--Austin 1994, no writ).

Id. at *15-*16. Because R & R failed to present Respondent with any competent summary evidence in support of the elements of its claims, Respondent clearly abused his discretion when it granted R & R's Rule 202 Petition.

Even if Respondent did not clearly abuse its discretion in considering Mr. Brockman's affidavits, exhibits and petition, R & R failed to raise a genuine issue of material fact on each of the elements of its claims within its control.

3. Defamation.

To maintain a defamation cause of action, the plaintiff must prove the defendant: (1) published a statement of fact; (2) that was defamatory[14] concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual,

[14] A plaintiff in Texas can recover for libel pursuant to statute or the common law. TEX. CIV. PRAC. & REM. CODE § 73.001 defines "libel" as defamation in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury, or to impeach any person's honesty, integrity, virtue or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury. TEX. CIV. PRAC. & REM. CODE § 73.001. At common law, libel must injure a person in her office, profession, or occupation (libel per se), impute a crime, impute a loathsome disease, or impute sexual misconduct to the plaintiff. *See, e.g., Morrill v. Cisek*, 226 S.W.3d 545, 549-50 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Villasenor v. Villasenor*, 911 S.W.2d 411, 418 (Tex. App.—San Antonio 1995, no writ); *Marshall v. Mahaffey*, 974 S.W.2d 942, 949 (Tex. App.—Beaumont 1998, pet. denied).

regarding the truth of the statement;[15] and (4) the plaintiff suffered pecuniary injury, except in cases of defamation is *per se*. *WFAA-TV, Inc. v. McLemore*, 978

[15] UCS's takeover of R & R was highly controversial. (C.R. 110-46) (R.R. 544-65). The blog was a forum for the auto industry, automobile dealers, R & R & UCS employees, agents, and representatives, and the community to post their opinions, thoughts, and emotional concerns about the takeover and its effects on the auto industry, their lives and their businesses. (See, e.g., R.R. 51; 60-61; 151). The blog received between 850 and 1150 hits a day, with most of the visitors visiting from Ohio, Texas, New York, and California. (R.R., 234, 409, 413, 477).

Whether a statement involves a public or a private issue is a question of law. *See, e.g., Connick v. Myers*, 461 U.S. 138, 148, n. 7 (1983). In general, a public issue is a "matter of public, social, or other concern to the community. *Id*. at 146. Whether a plaintiff is a public figure is also question of law. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

In *McLemore*, the Texas Supreme Court adopted the Fifth Circuit's three part test to determine whether a person is a limited purpose public figure:

(1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;

(2) the plaintiff must have more than a trivial or tangential role in the controversy; and

(3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

The Court also stated that in considering a libel plaintiff's role in a public controversy, several inquiries are relevant and instructive:

(1) whether the plaintiff actually sought publicity surrounding the controversy, (citations omitted);

(2) whether the plaintiff had access to the media, (citations omitted); and

(3) whether the plaintiff "voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation," *McLemore*, 978 S.W.2d at 571-73. (citations omitted). By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one "of the submarkets of ideas and opinions and consent therefore to the rough competition in the marketplace." *Id.* at 573. (citations omitted).

Here, as a matter of law, UCS's takeover of Reynolds was a public issue and Mr. Mr. Brockman was a limited purpose public figure. The auto industry was discussing it; people other than the R & R were likely to feel the impact of its resolution; Mr. Brockman and Reynolds had more than a

S.W.2d 568, 571 (Tex. 1998); *Leyendecker & Assocs. v. Wecter*, 683 S.W.2d 369, 374 (Tex. 1984).

First, the alleged defamatory statement Mr. Brockman is a bad business person and crook, is taken out of context and is not defamatory as a matter of law, and is barred by limitations. R & R filed its Rule 202 Petition on March 2, 2010. The blog posting is dated over one year earlier on February 19, 2009. (C.R. 370).

Second, the remaining complained of statements are not actionable statements of objectively verifiable assertions of fact as a matter of law. *See, e.g., Bentley v. Bunton*, 94 S.W.3d 561, 580-81 (Tex. 2002) (whether a publication is an actionable statement of fact, and not merely opinion and hyperbole, is a question of law); *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 21 (1990). For a statement to be actionable, a reasonable fact-finder must be able to conclude the statement implies an assertion of a fact ("statement of fact"). *See id.* at 20-21; *Thomas-Smith v. Mackin*, 238 S.W.3d 503, 507 (Tex. App.—Houston [14th Dist.] 2007, no pet).

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tangential role in the controversy by seeking media attention through media outlets and at the National Automobile Dealers Association Annual Conventions, by launching a Road Show in twenty cities, by holding Leadership Summits, and by advertising Mr. Brockman as the public face of Reynolds to create goodwill and dispel rumors; and the alleged defamation and disparaging blog posts arose out of R & R and Mr. Brockman's participation in the controversy. (C.R. 135-46) (R.R. 544-65).

Under *In re Does: 1-10*, R & R does not have to raise a genuine issue of material fact on the defamation elements **not** within R & R's control. Therefore, R & R does not have to raise a genuine issue of material fact to meet its Rule 202 burden on actual malice.

The United States Supreme Court held to determine whether a statement is an actionable statement of fact, the court should look at the entire context in which the statement was made, considering the following factors:.

1) the factual setting in which the statement was made (e.g. economic, social, political, etc.);

2) the format in which the statement appears (e.g. a newspaper, an online news website, a web blog, or a tweet);

3) the general tenor of the entire work; and

4) the reasonable expectations of the audience in that particular situation.

Milkovich, 497 U.S. at 18; *Bentley*, 94 S.W.3d at 581, 585.

The court construes the entire statement as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it. *Musser v. Smith Prot. Servs*., 723 S.W.2d 653, 655 (Tex. 1987). For a statement to be actionable, it also must be objectively verifiable as fact. *Milkovich*, 497 U.S. at 21; *Bentley*, 94 S.W.3d at 583; *Thomas-Smith*, 238 S.W.3d at 507.

The court in *Cahill* stated:

> Ranked in terms of reliability, there is a spectrum of sources on the internet. For example, chat rooms and blogs are generally not as reliable as the *Wall Street Journal Online*. **Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely. At least three courts have recently made this observation.** Addressing the issue as it related to

> statements made in a chat room about the performance of a specific publicly traded company, the Court in *Rocker Mgmt., LLC v. John Does 1 through 20*, noted that the messages tended to be 'replete with grammar and spelling errors; most posters do not even use capital letters. Many of the messages are vulgar and offensive, and are filled with hyperbole.' The court continued, '**in this context, readers are unlikely to view messages posted anonymously as assertions of fact.**'

Cahill, 884 A.2d at 465 (emphasis added).

R & R paraphrased the blog posts on the right hand-side of the table below in support of their Rule 202 Petition. Actual transcriptions of the posts attached as exhibits to Mr. Brockman's affidavits are shown on the left hand-side of the table. A comparison between the actual transcription of the posts and R & R's characterization of the posts reveals that R & R misrepresented the posts, failed to quote the actual statements, and took the posts out of context. When the actual transcription is considered and placed in context, the posts are not defamatory as a matter of law because they are not objectively verifiable statements containing assertions of fact.[16]

Doe Blog Posting (Actual Transcription)	***R & R's Paraphrase of the Blog Post containing allegedly Defamatory and Disparaging Statements Cited in R & R's Rule 202 Petition***
On June 5, 2009 - "I compare Bobo to Madoff. The guy was incredible how he scammed people	On June 5, 2009, The Trooper stated that Brockman is

[16] The asterisk in the table below is followed by argument.

out of money. If you would have asked people 5 years ago what you do think about Madoff? They would have told you he was a genius. He was not a genius, just ruthless. He took money from everyone and did not give a shit who he stole from. He stole from everyone equally. IMO - Bobo is exactly the same way. When he wants to make money he will crush anyone and everyone in his way. He does not care about people or morals." (C.R. 345). Once again IMO Bobo is a rich ruthless bastard who will do anything to anyone to make more money. If you judge people by how much money they have in there bank account then Bobo is a great guy. If you judge people by character, integrity, morals, and honestly [sic] then Bobo is Satan. (C.R. 347). **** Doe qualifies his entry by stating IMO," which means "in my opinion." Read in context, the statements concerning stealing indicate Doe was referring to Madoff, not Mr. Brockman. Doe does not say Mr. Brockman steals from people, but that Mr. Brockman is ruthless. Doe's statements were nearly a year and a half after a November 5, 2007 Automotive News Article, entitled "Brockman launches road show," in which Automotive News reported that Brockman had some things to say, including: ignore those persistent rumors about altering dealer contracts and sticking customers with higher bills; he's not phasing out the lower priced Reynolds' ERA system in favor of the company's high-end POWER dealership management system; he's not backing down on Reynolds' controversial stance on dealership data security, which***	"exactly" like Bernard Madoff and that Brockman "does not care about people or morals" and that "[i]f you judge people by character, integrity, morals, and honestly [sic] then [Brockman] is Satan. (C.R. 9).

requires independent providers to pay a fee to Reynolds; and he's not the ogre the industry has made him out to be. **(R.R. 544-46).** ***A September 4, 2006, Automotive News Article, entitled "Mystery man behind merger," under a sub-heading entitled "nervous customers," states "[s]ome customers know Brockman as a tough negotiator who sets rigid terms in contracts and enforces those terms to the letter. Some dealers who don't like Brockman's business methods now are reluctant to sign long term deals with Reynolds."*** **(C.R. 141-46).** ***No person of ordinary intelligence would perceive the statement Mr. Brockman is Satan as an objectively verifiable of statement fact.***	
On July 16, 2009 - I did not know the contract was not renewed by SnapOn. Is it because SnapOn does not want to do business with Bobo or is it they think they can do better without Reynolds? Bobo is one strange dude. I have been trying to figure this guy out for quite awhile now. His decisions make my head spin. Just imagine if the guy was well respected by the automotive community. He could damn near rule the whole thing. Instead he is looked at as the biggest idiot anyone has ever seen and no one wants to do business with him. (C.R. 208). ****Read in context, Doe is recounting his own and other's opinions and he is speculating about the future. No person of ordinary intelligence in this context would perceive this as an objectively verifiable statement of fact.***	On July 12, 2009, The Trooper stated that Brockman "is looked at as the biggest idiot anyone has ever seen and no one wants to do business with him." (C.R. 9). ****There is no blog post containing this quote on July 12, 2009.***

****Although the alleged defamatory and disparaging statement on the right is one of the six examples R & R cites in its Rule 202 Petition on page 3, (C.R. 9), Doe counsel's has asked three separate staff members to search the entirety of the blog posts attached to Mr. Brockman's affidavits to determine where the actual transcription of the paraphrased post on the right is located and not one of them could find the paraphrase to the right or a blog post closely resembling it regardless of date.***	On January 21, 2009, the Trooper accused Brockman of "destroy[ing] thousands of lives on a daily basis." (C.R. 9).
****Although the alleged defamatory and disparaging statement on the right is one of the six examples R & R cites in its Rule 202 Petition on page 3, (C.R. 9), Doe counsel's has asked three separate staff members to search the entirety of the blog posts attached to Mr. Brockman's affidavits to determine where the actual transcription of the paraphrased post on the right is located and not one of them could find the paraphrase to the right or a blog post closely resembling it regardless of date.***	On October 28, 2009, The Trooper stated that Brockman is a "lunatic" who caused R&R's customers and competition to perceive the company as "a joke." (C.R. 9).
On August 12, 2009 - On the left side of the page you will see a link for forums. Click the link "To Enter Forums". Read the comments about the new 6910 feature in ERA where a dealer has to answer a security question before moving on. What a joke. The best DMS product has been reduced to crap at the hands of Bobo. No wonder	On August 12, 2009, The Trooper stated that R&R's "best [dealer management system] product has been reduced to crap at the hands of [Brockman]. No wonder why dealers are hating the product so much lately." (C.R. 9).

why dealers are hating the product so much lately.*"* (C.R. 275). ***Doe's statements were nearly two years after the November 5, 2007 Automotive News Article, entitled "Brockman launches road show," where Brockman himself stated he was not backing down on Reynolds' controversial stance over dealership data security. The article also discusses Brockman's Leadership to Leadership Summits which he started in September 2007 to squelch rumors about his reputation as a tough, opinionated, hard-nosed business man who prefers litigation over negotiation. Brockman admits in the article that he wished he would have started the leadership summits sooner and that he is disappointed the rumor mill has not slowed down as fast as he thought it would.* (R.R. 544-46).**	
On February 19, 2009 - I have talked to many former UCS employees. Many of them off of the record about things. It is amazing how many of them think Bobo is a bad business person. I am sure many remember how bad Fin and Buzz were, but I don't think the majority of employees were against those CEOs. Yet when you mention Bob's name even people that have known him for 20 years said the guy is a crook. (C.R. 370). ***Doe is recounting what former employees told him and he is speculating about what Reynolds employees think collectively. No person of ordinary intelligence would perceive this post to contain an objectively verifiable statement of fact. This entry was made more than one year prior to the March 2, 2010, filing of R & R's Rule 202 Petition. Finally, the September 4, 2006, and November 5, 2007, Automotive News***	On February 10, 2009, the Trooper described Brockman as "a bad business person" and "a crook." ***There is no blog post containing this quote on February 10, 2009.***

Articles, and the December 18, 2008, Glassdoor Article establish Brockman had a bad reputation as a businessman prior to this entry. **(C.R. 141-46). (R.R. 544-46, 560-62).**	

Doe Blog Posting (Actual Transcription)	***R & R's Paraphrase of an Actual Blog Post Concerning Breach of Fiduciary Duty and/or Breach of Contract***
On February 12, 2008 - First NADA. It was crazy with Reynolds announcing they are pulling out of GM IDMS. You knew it was coming, but to make the announcement at NADA is just crazy. I had many people from GM and other MFGs asking what the announcement was about. Most did not understand, that Bob was in control and it is his way or the highway. (C.R. 00370). ****On Feb. 18, 2008, Automotive News published an article, entitled GM, Saturn: What after Reynolds?, reporting Brockman surprised dealers at the National Automobile Dealers Association Convention on Feb. 9, 2008 by telling them R & R would no longer sell the system. Even if Doe was an employee, officer, or director of R & R, which he denies, R & R's contention that this blog entry violated Doe's alleged fiduciary duty and/or breached the employment agreement fails because Mr. Brockman himself made the announcement at the NADA convention six (6) days prior to the blog entry.*** **(C.R. 135-37).**	On February 12, 2008, the Trooper stated that R&R announced that it was "pulling out of GM IDMS [Integrated Dealer Management System]" and that it was Brockman's decision – i.e., "his way or the highway."
On March 10, 2010 - "Right now everything is	On March 10, 2009, the Trooper

running quietly within the walls of Urey. I personally have a tough time with the new data center being built. We let hundreds (I am being nice) of associates go because 'we can not afford them due to economic downturn.' Then the next thing I know I look out the window and see a $40 million dollar state of the art data center being built. I am glad they are investing in the future here in Dayton, but why let so many associates go?" (C.R. 197). ***On March 23, 2007, the Dayton, Ohio Business Journal reported the new owner had implemented policy changes including layoffs and moves of 100s of workers to College Station, Texas. The article said the number of employees had shrunk by at least 10 percent and that 45 workers had refused to sign the new employment agreement containing the three year non-compete provision.* (C.R. 138-140).** ***R & R's contention this blog entry violated Doe's alleged fiduciary duty and/or breached the employment agreement fails because the new data center was visible from the street to anyone who passed by. This blog post tends to establish jurisdiction and venue over Doe are not proper in Texas.***	stated that R&R "let hundreds (I am being nice) of associates go" while building a "$40 million dollar state of the art data center."

Considering the posts in context, a person of ordinary intelligence would perceive the blog as a forum for anonymous individuals to express their opinions, "vent," and complain, not as a forum for factual information. Throughout the blog

were posts by other internet users that were vulgar, offensive, childish and immature:[17]

> On July 30, 2009 – "Hey, ***, you had the stripped version of the report. The positive responses are stripped out, leaving only the negatives, then the report is distributed to the managers for followup as a tool (yes a ***, just like you) for CSI improvement. On the last report, there were 12 negatives, out of several hundred total replies. Don't be such a *** ranger. Take the next exit, and get off of the hersey highway. With *** *** like you, this thread should be called: "Brown Eye Opener""(R.R. 248).
>
> On August 3, 2009 – "Sorry, ***, it was just to be sure I got through to you. So, limpwrist, I promise not to make more moonshot references. Ok, *** ?" (R.R. 249).
>
> On August 10, 2009 – "This guy looks like death warmed over. Just picture his white candy *** with a big old stained *** diaper and then picture Bates, Lamb or Orrico changing his diapers for him and putting baby powder on the *** thing." (R.R. 256).
>
> On August 10, 2009 – "***! Drinking that Texas oil must have caused some severe brain damage to this boy. Is he so worried about his own wallet being affected that he forgot about how people lose health care insurance when they are put out of their jobs by business leader such as him? Did he forget that it was greed and incompetence on the part of business leaders and (mostly Republican) politicians that out us into this big economic mess?" (R.R. 258).
>
> On August 10, 2009 – "Bobo is an *** clown." (R.R. 258).

Viewing the entire context in which the complained of blog entries were made: its factual setting; its format; its general tenor; and the reasonable

[17] The posts are the type of robust exchanges protected by the First Amendment and described in *Cahill* as "vulgar and offensive, and [] filled with hyperbole." *Cahill*, 884 A.2d at 465; *See also Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 234-35 (Cal. App. 2008).

expectations of the audience; it is clear the posts are mere opinions, epithets, hyperbole, satire, sarcasm, irony and emotional venting. No person of ordinary intelligence would perceive the statements as objectively verifiable statements of fact.

In *Krinsky*, Lisa Krinsky, the president, chairman, and CEO of a publically traded company, sued Doe 6 seeking his identity by subpoena for allegedly defaming and disparaging her on Message boards and other websites and for interfering with her business and contractual relationships. *Krinsky*, 72 Cal. Rptr. 3d at 234-35. Doe 6's posts stated Krinsky was a "crook," and that she had a "fake medical degree," and "poor feminine hygiene." *Id.* at 247. The appellate court reversed the trial court and refused to order the disclosure of Doe's identity pursuant to the First Amendment. *Id.* at 234, 251-52.

The court stated the messages "**viewed in context, cannot be interpreted as asserting or implying objective facts.**" *Id.* at 248 (emphasis added).

> It hardly need be said that this conclusion should not be interpreted to condone Doe 6's rude and childish posts; indeed, his intemperate, insulting, and often disgusting remarks understandably offended plaintiff and possibly many other readers. **Nevertheless, the fact that society may find speech offensive is not a sufficient reason for suppressing it.** Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

Id. at 249 (emphasis added). (citations omitted). Similarly, when viewed in context as required by *Milkovich, Bentley, Cahill* and *Krinsky*, Doe's blog posts cannot be viewed as containing objectively verifiable statements of fact.

Third, as a matter of law, Reynolds has no right to assert a defamation claim because such a claim must be brought by the corporation's owner, not the corporation. *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960). Therefore, Reynolds is not entitled to a Rule 202 deposition for defamation. Moreover, Mr. Brockman also cannot seek relief on behalf of R & R because there is no evidence in the record Mr. Brockman owns Reynolds.

Fourth and most importantly, R & R produced no competent summary judgment evidence on its alleged damages. Actual damages in defamation actions fall into two categories: (1) "economic," "special," or "out-of-pocket," damages such as lost income and lost employment benefits; and (2) "noneconomic" or "general" damages such as mental anguish and injury to reputation. TEX. CIV. PRAC. & REM. CODE §§ 41.001(4); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (defamation damages are not confined to "out-of-pocket loss"); *Morrill v. Cisek*, 226 S.W.3d 545, 550-51 & n.3-4 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Defamatory statements can be categorized as *per quod* or *per se*. *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings*, Inc., 219 S.W.3d 563, 580

(Tex. App.—Austin 2007, pet. denied). Statements that are defamatory *per quod* are actionable only when damages are alleged and proven. The plaintiff must carry the burden of proof on **both the existence of, and amount of damages.** *Id.*

In cases of defamation *per se*, however, damages are presumed from the nature of the defamation; such an action can be sustained without specific proof of the existence and amount of harm. *Id.* at 580-81 (citing *Bentley*, 94 S.W.3d at 605; *Knox v. Taylor*, 992 S.W.2d 40, 50 (Tex. App.—Houston, [14th Dist.] 1999, no pet.).

As a matter of law, none of the blog posts when read in context rise to the level of actionable defamation *per se* or *per quod*. Even if this Court finds the statements rise to the level of defamation *per quod*, R & R must prove the existence of and amount of damages it suffered. The only allegations of damages R & R produced are Mr. Brockman's affidavits, which state in relevant part:

> The Trooper Blog posts were directly injurious to Reynolds & Reynolds and myself in terms of damaged reputation, loss of business, lost prospective employees (i.e., damaged recruiting), mental anguish damages, and lost salary and benefits paid to an employee working against R & R interests.

(C.R. 185-86, ¶ 7). Doe timely objected to Mr. Brockman's affidavit. (CR 443-50). Doe objected to ¶ 7 on the basis that it is conclusory and speculative and that Mr. Brockman did not support it with written evidence of actual damages. (CR

443-50). Doe also objected to paragraph 8 of Mr. Brockman's affidavit.[18] Near the conclusion of the evidentiary hearing on May 21, 2010, Mr. Brockman and R & R tendered an amended affidavit to the trial court. (R.R. 45-47) (R.R. p. 28:1-16). Doe objected to the amended affidavit as untimely. (R.R. 28, lines 17-19). Doe also filed written objections to the amended affidavit. (C.R. 522-30). Mr. Brockman's amended affidavit is the same as his prior affidavit with the exception of the words "and the statements herein are true and correct" in the introductory paragraph. (R.R. 45-47). Mr. Brockman had an opportunity to, but did not, amend his affidavit to address Doe's objections concerning the unsupported conclusory allegations on damages in ¶ 7-¶ 8. (R.R. 45-47).

Unsubstantiated legal and factual conclusions and subjective beliefs unsupported by evidence are defects of substance and are not waivable. *See, e.g.*, *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991); *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 381-82 (Tex. 1978); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex.

[18] Paragraph 8 states in relevant part: "Based on my business experience, the facts of this matter," *which are not explained or described in any detail in the affidavit*, "and my knowledge of the policies and objectives of the company," *which are also not explained or described in any detail in the affidavit*, "I consider any direct communication between an R & R employee and adverse litigation counsel to be highly injurious to the company and a gross breach of the employee's contractual and fiduciary duties." (C.R. 186). Doe objected to this paragraph on the basis that it was irrelevant and conclusory. (C.R. 444). Doe denied under oath that he was an employee of R & R. (C.R. 464-65).

App.—Houston [14th Dist.] 2000, no pet.). R & R offered no other evidence of its alleged damages.

Similarly, in *Dendrite Int'l, Inc.*, the Court refused to order the disclosure of John Doe No. 3's identity when the defamation plaintiff failed to produce **specific proof establishing its harm**. 775 A.2d at 769-70. The Court stated:

> It is not obvious that the statements at issue are false or that Dendrite has been harmed. Dendrite has failed to show that the messages in question in any way harmed Dendrite. **Although Dendrite alleges that it has been harmed and that it will continue to be harmed by the defendants' statements, saying it is so does not make the alleged harm a verifiable reality.** In his reply certification, Michael Vogel, Dendrite's counsel, attempts to link the messages posted in this case to a drop in Dendrite's stock price. . . . Furthermore, Mr. Vogel has not purported to be an expert in the field of stock valuation and analysis, thus, he cannot draw the conclusion that the fluctuations in Dendrite's stock prices are anything more than coincidence.

Id. at 760-61, 669. (emphasis added).

Assuming without conceding, R & R suffered from injured reputations and loss of business after the inception of the blog, there is no evidence that links Doe's statements with R & R's alleged injured reputations or alleged lost business. Between 2007 and early 2010, when the blog was on the internet, the American economy suffered the greatest economic downturn since the Great Depression. GM and Chrysler declared bankruptcy, and Reynolds' customers, the automobile

dealers, were particularly hard hit.[19] R & R cannot present a causal nexus between the blog and any alleged harm R & R suffered. Moreover, Doe presented evidence establishing that R & R had reputation and business problems when UCS acquired Reynolds in August 2006. (R.R. 544-546).

4. Business Disparagement

To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff. *Forbes, Inc. v. Granada Biosciences, Inc*., 124 S.W.3d 167, 170 (Tex. 2003) (citing *Hurlbut v. Gulf Atl. Life Ins. Co*., 749 S.W.2d 762, 766 (Tex. 1987). The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests. *Id*. To prove special damages, the plaintiff must prove the disparaging communication played a substantial part in inducing third parties not to deal with the plaintiff, **resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings.** *Hurlbut*, 749 S.W.2d at 766-67.

[19] Doe asks this Court to take judicial notice of the fact of the Great Recession and the fact that General Motors and Chrysler declared bankruptcy. TEX. R. EVID. 201(b); *Fields v. City of Texas City*, 864 S.W.2d 66, 69 (Tex. App.—Hous. [14th Dist.] 1993, writ denied).

For the same reasons as set forth above with respect to defamation, R & R has not raised a genuine issue of material fact on each of the elements of its business disparagement claim. R & R has not raised a genuine issue of material fact on whether Doe published false and disparaging information about it and it failed to raise a genuine issue of material fact on damages. Mr. Brockman's affidavits and the alleged blog excerpts attached thereto are not competent summary judgment evidence. (C.R. 184-87) (R.R. 45-47).

Doe objected to Mr. Brockman's statement that the posts were "directly injurious to Reynolds & Reynolds and myself in terms of damaged reputation, loss of business, lost prospective employees (i.e., damaged recruiting), mental anguish damages, and lost salary and benefits paid to an employee [Trooper] working against R & R's interests," (C.R. 184-86), because it is conclusory, unsupported by facts, and contains legal conclusions and opinions Mr. Brockman is unqualified to make. (C.R. 443-50, 522-30) (R.R. 28:17-19).

In *Astoria* the court found that Brand FX's affidavit offered in support of its business disparagement claim was no evidence of Brand FX's damages because it failed to state what damages Brand FX **actually incurred** as a result of the disparagement. *Astoria Industries of Iowa, Inc. v. SNF, Inc*., 223 S.W.3d 616, 629 (Tex. App.—Fort Worth 2007, pet. denied). The *Astoria* court also found that speculative future losses, such as advertising to correct the disparagement, are not

recoverable because they had not been incurred. *Id.* Mr. Brockman's affidavits are no different. Accordingly, R & R's failed to present any competent summary judgment evidence that any such losses were incurred. (R.R. 46-47, 288-290). Finally, damages to reputation and consequential mental distress are not recoverable in a business disparagement case. *Dwyer v. Sabine Mining Co*., 890 S.W.2d 140, 143 (Tex. App.—Texarkana 1994, writ denied). Therefore, neither Mr. Brockman nor Reynolds raised a genuine issue of material fact on special damages.

5. Breach of Fiduciary Duty

To prevail on a breach of fiduciary duty claim, a plaintiff must show (1) a fiduciary relationship between the plaintiff and the defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach. *Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). A fiduciary relationship may arise from formal and informal relationships and may be created by contract. *Id.*

There is no evidence in the record that Doe has a fiduciary relationship with R & R. R & R contends Doe is an employee of R & R and as such, the alleged blog statements violate fiduciary duties to R & R. The only evidence R & R produced to establish that Doe is an employee of Reynolds are Mr. Brockman's affidavits and

the unsigned employment agreement, that are not, as described above, competent summary judgment evidence. (C.R. 184-187) (R.R. 45-47). The blog excerpts are likewise incompetent because they not authenticated, are taken out of context, and are inadmissible hearsay upon hearsay. The only competent summary judgment evidence in the record concerning Doe's employee status is his affidavit. (C.R. 464-66). Accordingly, Doe is not a fiduciary of Reynolds. Moreover, because Doe has no employment agreement with Mr. Brockman in his individual capacity, Doe owes no fiduciary duty to Mr. Brockman.

R & R also failed to raise a genuine issue of material fact on damages for Doe's alleged breach of fiduciary duty. During the evidentiary hearing, R & R's counsel stated:

> The concept that we have not met our burden on damages, if it's a fiduciary duty claim we have, we don't have to prove damages. We can get damages for disgorgement.

(R.R. 15). R & R is wrong. The employment agreement contains an Ohio choice of law provision. **(**C.R. 142). Assuming arguendo, even if a Texas court were to exercise personal jurisdiction over Doe, even if Doe is an employee of Reynolds, and even if a court did not compel arbitration based on Reynolds' employment agreement, a Texas court would be required to follow Ohio law.

Under Ohio law, a plaintiff must prove an injury proximately resulting from the alleged breach. *Camp St. Mary's Assn. of W. Ohio Conf. of the United*

Methodist Church, Inc. v. Otterbein Homes, 889 N.E.2d 1066, 1077 (Ohio App. 3d Dist. 2008). While R & R's argument may hold true under Texas law, counsel's argument ignores Ohio law and the employment agreement R & R itself submitted to Respondent. Regardless, because Doe is not an employee of Reynolds, Doe has owes no fiduciary duty to Reynolds.

6. Breach of Contract

R & R should be required to raise a genuine issue of material fact on each of the following elements of breach of contract: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *B&W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App—Houston [1st Dist.] 2009, pet. denied) (internal citations omitted). "A breach of contract occurs when a party fails or refuses to do something he has promised to do." *Id.* at 16.

R & R's contention Doe is an employee of R & R and signed the employment agreement is insufficient to raise a genuine issue of material fact on any element of R & R's breach of contract claim. **First,** as set forth above, R & R has failed to produce any competent summary judgment evidence establishing Doe is an employee of Reynolds. The only competent summary judgment evidence is Doe's affidavit, which conclusively establishes Doe is not an employee, officer, or director of Reynolds. (C.R. 464-66).

Second, Mr. Brockman's statement "[d]uring the entire lifespan of the "Trooper" Blog, all Reynolds' employees (including by definition, the "Trooper") were bound by a written Employment Agreement," (R.R. 46, 289) is pure speculation and does not establish a contractual relationship between Doe and Reynolds. Reynolds has been in business since 1866 and it has over 5,000 employees. (C.R. 8). Mr. Brockman has no personal knowledge of whether each Reynolds employee signed the agreement attached to his affidavits. Moreover, after UCS's purchase of Reynolds, Reynolds laid off employees and others refused to sign the agreement. (C.R. 138). Mr. Brockman's statements concerning the employment agreement are too attenuated to rise to the level of competent summary judgment evidence when First Amendment rights are at stake. In the absence of proof of a valid contract, R & R cannot raise a genuine issue of material fact on any of the elements of its breach of contract claim.

CONCLUSION

Respondent clearly abused its discretion for which there is no adequate remedy by appeal when Respondent granted R & R's Rule 202 Petition. Respondent failed to strictly adhere to the threshold requirements of Rule 202 when Respondent found it was a proper court with jurisdiction and venue over the parties. Second, Respondent failed to require R & R to introduce *prima facie* proof raising a genuine issue of material fact on each of the elements of R & R's claims within R & R's control. As a result, Respondent clearly abused its discretion for which Doe has no adequate remedy by way of appeal when Respondent found allowing R & R to take the deposition of Google prevented a failure or a delay of justice in an anticipated suit and that the likely benefit of allowing R & R to take the deposition of Google to investigate a potential claim outweighed the burden or expense of the procedure.

PRAYER

Relator asks this Court to conditionally grant Relator a writ of mandamus and to direct Respondent to vacate its July 15, 2011, Order ordering Google to disclose Relator's identity. Relator prays for all other and such further relief, both at law and in equity, to which Relator may show himself justly entitled.

Respectfully submitted,

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CERTIFICATION

I certify that I have reviewed this brief and every factual statement in Relator's Brief in Support of Petition for Writ of Mandamus is supported by competent evidence included in the Record and/or the Appendix to Relator's Petition for Writ of Mandamus previously filed in this case. On February 1, 2013, I signed a Verification that was filed with Relator's Petition for Writ of Mandamus in which I verified that the Record, consisting of the Clerk's Record and the Reporter's Record, and the Appendix contained true and correct copies of the same.

/s/ Shelly L. Skeen
Shelly L. Skeen

CERTIFICATE OF COMPLIANCE

I certify that Relator's Brief in Support of Petition for Writ of Mandamus contains 13,827 words considering the requirements for length set forth in Texas Rule of Appellate Procedure 9.4.

/s/ Shelly L. Skeen
Shelly L. Skeen

CERTIFICATE OF SERVICE

I certify that Realtor served a true and correct copy of Relator's Brief in Support of Petition for Writ of Mandamus was served on counsel for the Real Parties in Interest and Respondent on this the 3rd day of June 2013, as follows:

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